The Owner of Ship or Vessel 'Lavela' v The Owner of Ship or Vessel 'Basilia'

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-27NCC-2–02 OF 2018
MOHD IVAN JC
31 OCTOBER 2018

Shipping and Navigation — Admiralty — Wrongful arrest of vessel — Collision claim by plaintiff — Defendant filed application for order of stay of proceedings and damages for wrongful arrest — Whether there was material non-disclosure of letter of undertaking — Whether warrant of arrest ought to be set aside — Whether letter of undertaking binding on parties — Whether second letter of undertaking ought to be discharged and canceled — Whether there was wrongful arrest of defendant's vessel — Whether defendant entitled to damages

The defendant's vessel 'Basilia' was alleged to have collided into the plaintiff's vessel 'Lavela' which was anchored at the Port of Istanbul, Turkey. The collision developed into a collision claim, where two things arose. The first was security for the claim, as ships were itinerant and any claimant would want to be assured that its claim, once adjudicated, could be satisfied. The format was a letter of undertaking using the ASG-1 Form. The second was the forum where such adjudication proceedings was carried out, or what was usually canvassed as the jurisdictional issue. Form ASG-2 would be used to record the consensus of the parties as to the forum. Both vessels were insured with Protection and Indemnity Clubs ('the PIC'), where after the collision, communication had been initiated between The London PIC ('the London PIC') for the defendant, and The United Kingdom Freight Demurrage and Defence Association Ltd ('the UK PIC') for the plaintiff. A quick factual background revealed that a letter of undertaking dated 13 February 2018 ('the first letter') was issued by the London PIC, which according to the defendant, would have met the plaintiff's need for security. It was denied by the plaintiff. By a warrant of arrest dated 14 February 2018, the defendant's vessel was arrested at the Port of Tanjung Pelepas, Johor, Malaysia on the 15 February 2018. After another letter dated 20 February 2018 ('the second letter') was issued, allegedly under protest, the defendant's vessel was released on the 22 February 2018. The defendant then filed an application under encl 15 and sought for the following orders: (a) stay of the proceedings herein on the basis that the English Court should be the forum for the plaintiff's collision claim; (b) to set aside the warrant of arrest; (c) to declare the letter of undertaking was binding on the parties; (d) to discharge, cancel and return the second letter of undertaking issued by the London PIC; (e) to declare as wrongful the arrest of the vessel

'Basilia' from 15–22 February 2018; and (f) for damages for wrongful arrest to be assessed.

Held, allowing the defendant's application:

(1) On the requirement for material disclosure of facts necessitating an arrest to be made, from the tone of submissions from both parties, the court found that that there was a concession that there was a general duty or obligation for disclosure. There must first be disclosure of the letter of undertaking before there can be any basis or foundation to mount a challenge as to its adequacy. Under the circumstances of the present case, it was found that that there was material non-disclosure and a breach of the duty to act in good faith. Without the disclosure of the letter of undertaking, the issue of whether the undertakings given therein were sufficient or otherwise could not have arisen (see paras 18, 21 & 25).

(2) The prevailing thread running through all the decisions on setting aside warrant of arrest was that there must be mala fides or 'crassa negligentia' shown. The arrest of the vessel in Malaysia would go hand in hand with the intention to have the collision claim adjudicated by the Malaysian court (see paras 30 & 32).

(3) On the issue of jurisdiction, in the exchange of emails between the parties, there was never any mention of having the collision claim being adjudicated by the High Court in Malaysia. In fact, the plaintiff had inquired in an email dated 5 February 2018 whether the defendant would agree to English jurisdiction using the 'ASG2' format. It was not as if the defendant had imposed a jurisdiction unilaterally in the letter of undertaking, which was arbitrary, objectionable and wholly outside the contemplation of the plaintiff. There was also evidence of proceedings before some tribunal in Russia with regard to the collision, which was likely initiated by the plaintiff as the party aggrieved by the collision (see paras 33–34).

(4) Looking at the second letter of undertaking, the court agreed that the defendant had little choice to accede to the issuance of the second letter of undertaking as a means to expedite the release of the vessel. The contents of the second letter of undertaking was somewhat indicative that except for the jurisdictional issue, its difference or variation from the first letter of undertaking was not to such a degree as to warrant immediate recourse to the court (see para 36).

(5) In the event of the arrest of a vessel being wrongful, as a consequence, the defendant would be entitled to damages as per in the case of *Ocean Gain Shipping Pte Ltd v Owner and/or Charterer of Demise of Vessel Dong Nai Registered at Haiphong Port, Vietnam (The Dong Nai)* [1996] 4 MLJ 454 (see paras 37–38).

(6) Although it was challenged that the first letter of undertaking was not between the parties, the court was satisfied that the provisions of ss 179 and 190 of the Contracts Act 1950 were applicable (see paras 39–40).

(7) The second letter of undertaking was achieved under the then prevailing situation of the defendant's vessel having been arrested and with a view of expediting its release. The defendant had relied on the provisions of ss 14, 15 and 19 of the Contracts Act 1950 to avoid the second letter. Looking at the circumstances, the court inclined to believe that it could not have been voluntary or embarked upon on level terms. The court accepted that such expedience could even have amounted to mitigation of sorts by the defendant. On totality, the letter of undertaking had met all the conditions imposed by the plaintiff with no other requirements that would have necessitated an arrest of the defendant's vessel (see paras 43–46).

(8) There should have been some correspondences which could be said to be a contemporaneous record that an agreement had not been achieved under the letter of undertaking. Under those circumstances and taken with the non-disclosure of the letter of undertaking, the court found that the letter of undertaking was already ad idem between the parties, and that the second letter was on a balance of probabilities, procured by duress. In the premises, the court allowed the second letter to be set aside. As the letter of undertaking had constituted a concluded contract which would be binding between the parties, the court was satisfied that the defendant had succeeded in its challenge on a balance of probabilities that the arrest of its vessel was wrongful. Consequently, the defendant would be entitled to damages (see paras 47–49).

[Bahasa Malaysia summary

Kapal 'Basilia' defendan dikatakan telah berlanggar dengan kapal 'Lavela' plaintif yang berlabuh di Pelabuhan Istanbul, Turki. Pelanggaran itu menjadi tuntutan pelanggaran, di mana dua perkara timbul. Pertama adalah jaminan untuk tuntutan itu, kerana kapal-kapal tersebut adalah randah dan mana-mana penuntut mahu mendapt jaminan bahawa tuntutannya, selepas diadili, dapat dipenuhi. Format tersebut merupakan surat akujanji menggunakan Borang ASG-1. Kedua adalah forum di mana prosiding pengadilan dijalankan, atau apa yang biasanya dikumpul sebagai isu bidang kuasa. Borang ASG-1 digunakan untuk merekodkan persetujuan pihak-pihak berhubung forum itu. Kedua-dua kapal tersebut telah diinsuranskan dengan Protection and Indemnity Clubs ('PIC'), di mana selepas pelanggaran itu komunikasi telah dimulakan antara The London PIC ('London PIC') untuk defendan, dan The United Kingdom Freight Demurrage and Defence Association Ltd ('UK PIC') untuk plaintiff. Latar belakang faktual yang segera menunjukkan bahawa surat akujanji bertarikh 13 Februari 2018 ('surat pertma') telah dikeluarkan oleh London PIC, yang mana menurut defendan,

memenuhi syarat jaminan plaintif. Ini dinafikan oleh plaintif. Melalui waran tangkap bertarikh 14 Februari 2018, kapal defendan telah ditahan di Pelabuhan Tanjung Pelepas, Johor, Malaysia pada 15 Februari 2018. Selepas surat lain bertarikh 20 Februari 2018 ('surat kedua') dikeluarkan, dikatakan bantahan, kapal defendan telah dilepaskan pada 22 Februari 2018. Defendan kemudian telah memfailkan permohonan di bawah lampiran 15 dan memohon perintah-perintah berikut: (a) penggantungan prosiding tersebut berasaskan bahawa Mahkamah Inggeris patut merupakan forum untuk tuntutakn pelanggaran plaintif; (b) untuk mengetepikan waran tangkap tersebut; (c) untuk mengisytiharkan surat akujanji tersebut mengikat pihak-pihak; (d) untuk melepaskan, membatalkan dan mengembalikan surat akujanji kedua yang dikeluarkan oleh London PIC; (e) untuk mengisytiharkan tahanan kapal 'Basilia' itu adalah salah dari 15–22 Februari 2018; dan (f) untuk ganti rugi kerana tahanan salah ditaksir.

Diputuskan, membenarkan permohonan defendan:

(1) Berhubung keperluan penzahiran material fakta yang diperlukan untuk tangkapan dibuat, berdasarkan hujah daripada kedua-dua pihak, mahkamah mendapti terdapat konsesi bahawa wujud kewajipan am atau obligasi untuk penzahiran. Terlebih dahulu perlu ada penzahiran surat akujanji sebelum ada apa-apa asas untuk memulakan cabaran berhubung kecukupannya. Di bawah keadaan kes ini, ia didapati bahawa terdapat perkara material yang tidak didedahkan dan pelanggaran kewajipan untuk bertindak dengan niat baik. Tanpa penzahiran surat akujanji itu, isu sama ada akujanji yang diberikan itu mencukupi atau sebaliknya tidak mungkin timbul (lihat perenggan 18, 21 & 25).

(2) Alasan yang masih wujud dalam semua keputusan untuk mengetepikan waran tangkap adalah bahawa mesti ada niat jahat atau 'crassa negligentia' yang ditunjukkan. Penahanan kapal di Malaysia adalah konsisten dengan niat untuk membuat tuntutan pelanggaran yang diadili oleh mahkamah Malaysia (lihat perenggan 30 & 32).

(3) Berhubung isu bidang kuasa, dalam pertukaran emel antara pihak-pihak, tidak pernah dinyatakan tentang tuntutan pelanggaran diadili oleh Mahkamah Tinggi di Malaydia. Bahkan, plaintif telah bertanya dalam emel bertarikh 5 Februari 2018 sama ada defendan bersetuju dengan bidang kuasa Inggeris yang menggunakan format 'ASG2'. Ia bukan seperti defendan telah menggunakan bidang kuasa secara unilateral dalam surat akujanji itu, yang sewenang-wenangnya, boleh dibantah dan di luar jangkaan plaintif. Juga terdapat keterangan tentang prosiding sebelum tribunal di Rusia berhubung pelanggaran itu, yang berkemungkinan telah dimulakan oleh plaintif (lihat perenggan 33–34).

(4) Melihat surat akujanji kedua, mahkamah bersetuju bahawa defendan tidak mempunyai pilihan untuk bersetuju dengan keluaran surat

akujanji kedua sebagai cara untuk mempercepat pembebasan kapal itu. Isi surat akujanji kedua itu menunjukkan bahawa kecuali berhubung isu bidang kuasa, perbezaan atau perubahannya daripada surat akujanji pertama tidaklah sampai kepada tahap tertentu sehingga mewajarkan bantuan segera mahkamah (lihat perenggan 36).

(5) Sekiranya penahanan kapal itu adalah salah, akibatnya adalah, defendan berhak mendapat ganti rugi seperti dalam kes *Ocean Gain Shipping Pte Ltd v Owner and/or Charterer of Demise of Vessel Dong Nai Registered at Haiphong Port, Vietnam (The Dong Nai)* [1996] 4 MLJ 454 (lihat perenggan 37–38).

(6) Walaupun dicabar bahawa surat akujanji pertama bukanlah antara pihak-pihak, mahkamah berpuas hati bahawa peruntukan-peruntukan ss 179 dan 190 Akta Kontrak 1950 adalah terpakai (lihat perenggan 39–40).

(7) Surat akujanji kedua telah diperoleh di bawah keadaan semasa kapal defendan yang telah ditahan dan dengan tujuan mempercepatkan pelepasannya. Defendan telah bergantung kepada peruntukan ss 14, 15 dan 19 Akta Kontrak 1950 untuk mengelak daripada surat kedua tersebut. Melihat keadaan itu, mahkamah cenderung untuk mempercayai bahawa ia tidak boleh secara sukarela atau dimulakan atas terma yang dipersetujui. Mahkamah menerima bahawa kesesuaian sedemikian mungkin telah pun menimbulkan mitigasi oleh defendan. Secara keseluruhan, surat akujanji itu telah memenuhi semua syarat yang dikenakan oleh plaintif tanpa syarat lain yang diperlukan untuk penahanan kapal defendan (lihat perenggan 43–46).

(8) Harus ada beberapa surat-menyurat yang boleh dikatakan sebagai rekod sezaman bahawa satu perjanjian tidak dicapai di bawah surat akujanji itu. Dalam keadaan sedemikian dan berdasarkan surat akujanji yang tidak didedahkan, mahkamah mendapati bahawa surat akujanji itu telah menjadi *ad idem* antara pihak-pihak, dan surat kedua itu adalah atas imbangan kebarangkalian, yang diperoleh secara paksaan. Dalam premis ini, mahkamah membenarkan surat kedua itu diketepikan. Memandangkan surat akujanji itu merupakan kontrak yang disimpulkan yang akan mengikat antara pihak-pihak, mahkamah berpuas hati bahawa defendan telah berjaya dalam cabarannya atas imbangan kebarangkalian bahawa penahanan kapalnya salah. Berikutan itu, defendan berhak mendapat ganti rugi (lihat perenggan 47–49).]

Notes

For cases on wrongful arrest of vessel, see 11(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1301–1306.

Cases referred to

Centro Latino Americano de Commercio Exterior SA v Owners of Kommunar, The Kommunar (No 3) [1997] 1 Lloyd's Rep 22 (refd)

Evmar, The [1989] 2 MLJ 460; [1989] 1 LNS 39, HC (distd)

Galaxy Energy International Ltd and Corona Trading Associates SA v Assuranceforeningen Skuld (Ejensidie), The Oakwell [1999] 1 Lloyd's Rep 249, QBD (refd)

Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 322, CA (refd)

Moschanthy, The [1971] 1 Lloyd's Rep 37 (refd)

Ocean Gain Shipping Pte Ltd v Owner and/or Charterer of Demise of Vessel Dong Nai Registered At Haiphong Port, Vietnam (The Dong Nai) [1996] 4 MLJ 454, HC (refd)

Pao On and others appellants v Lau Yiu Long and others respondents [1980] AC 614, PC (refd)

Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or any other Person Interested in the Ship or Vessel the 'Borcos Takdir' [2011] 6 MLJ 562, HC (refd)

'Vasiliy Golovnin', The [2008] 4 SLR 994, CA (refd)

Legislation referred to

Contracts Act 1950 ss 14, 15, 19, 179, 190

Aisya bt Abu Bakar (Christopher & Lee Ong) for the plaintiff.

Sitpal a/p Selvaratnam (Aleeya Elyana bt Ahmad Mahreez with her) (Tommy Thomas) for the defendant.

Mohd Ivan JC:

[1] This case was not about a romantic notion of two ships passing in the night, but of two ships colliding on or about the 11 January 2018. The defendant's vessel 'Basilia' was alleged to have collided into the plaintiff's vessel 'Lavela' which was anchored at the Port of Istanbul, Turkey.

[2] This would develop into a collision claim, where two things would arise. The first would be security for the claim, as ships are itinerant and any claimant would want to be assured that its claim, once adjudicated, can be satisfied. Here, the format was a letter of undertaking using the ASG-1 Form.

[3] The second would be the forum where such adjudication proceedings would be carried out, or what would usually be canvassed as the jurisdictional issue. Parties should usually be able to agree as to which forum would be the most convenient for them in terms of the logistics for having the matter heard and adjudicated upon, failing which it may have to be argued out. In the case

here, Form ASG-2 would be used to record the consensus of the parties as to the forum.

[4] Both vessels were insured with Protection and Indemnity Clubs ('PIC'), where after the collision, communication had been initiated between The London PIC ('London PIC') for the defendant, and The United Kingdom Freight Demurrage and Defence Association Ltd ('UK PIC') for the plaintiff.

[5] A quick factual background would reveal that a letter of undertaking dated 13 February 2018 ('LOU') had been issued by the London PIC, which according to the defendant, would have met the plaintiff's need for security. This was denied by the plaintiff.

[6] By a warrant of arrest dated 14 February 2018, the defendant's vessel was arrested at the Port of Tanjung Pelepas, Johor, Malaysia on the 15 February 2018.

[7] After another letter dated 20 February 2018 ('second letter') was issued, allegedly under protest, the defendant's vessel was released on the 22 February 2018.

[8] The defendant then filed an application under encl 15 for orders which are, inter alia, as follows:

(a) stay of the proceedings herein on the basis that the English Court should be the forum for the plaintiff's collision claim;

(b) to set aside the warrant of arrest;

(c) to declare the LOU to be binding on the parties;

(d) to discharge, cancel and return the second letter issued by the London PIC;

(e) to declare as wrongful the arrest of the vessel 'Basilia' from the 15–22 February 2018; and

(f) for damages for wrongful arrest to be assessed.

[9] An arrest under the circumstances herein can only be predicated on extracting security for the collision claim. Security has to be, in the appropriate context, on the best case scenario with, perhaps, interest and costs included. It cannot be disproportionate to the damages suffered in the collision, otherwise the possibility of abuse would present itself, as the arrest of a vessel is a powerful recourse.

[10] Cases such as *The Moschanthy* [1971] 1 Lloyd's Rep 37 would serve to illustrate the applicable principles.

[11] The use of letter of undertakings by insurance clubs would be a preferred mechanism as an alternative or compromise to an arrest. See: *Galaxy Energy International Ltd and Corona Trading Associates SA v Assuranceforeningen Skuld (Ejensidie), The Oakwell* [1999] 1 Lloyd's Rep 249.

[12] In *The 'Vasiliy Golovnin'* [2008] 4 SLR 994, it was stated that '... the mere threat of an arrest will be sufficient to invoke the owners of the ship threatened with arrest into providing a voluntary security, and no actual arrest usually takes place after that'.

[13] The defendant had referred to the case of *Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or any other Person Interested in the Ship or Vessel the 'Borcos Takdir'* [2011] 6 MLJ 562 which had set out the various principles on the valid considerations for arrest.

[14] The LOU issued by the London PIC to 'The owners of the MV Lavela' dated 13 February 2018 had stated as follows:

> MV Lavela — Collision with MV Basilia off Ahirkapi Anchorage Area on 11.01.2018
>
> IN CONSIDERATION of your releasing and/or refraining from arresting or re-arresting at any time hereafter or otherwise detaining the MV Basilia or any other vessel or property in the same or associated ownership, management, possession or control for the purpose of obtaining security in respect of your claim arising out of the above collision we hereby undertake to pay you on demand such sum or sums as may be due to you on demand such sum or sums as may be due to you from the owners of the MV Basilia in respect of your said claim either by agreement between the parties or by final unappealable judgment of the English Courts provided always that our liability hereunder inclusive of interest and costs shall not exceed the sum of USD 400,00 (US Dollars Four Hundred Thousand Only).
>
> This undertaking shall be governed by English Law and any dispute arising hereunder shall be submitted to the exclusive jurisdiction of the English Courts.

[15] The above LOU was issued in response to an email dated 13 February 2018 from the plaintiff's UK PIC which had stated as follows:

> As a compromise, our member could accept security as US$400,000 inclusive of interest and costs. Alternately $250,000 plus interest and costs with the right to rearrest. In either case, acceptance would require an open message from the London P7I for and on behalf of the owner and/or bareboat charterer of BASILIA confirming that the owner and/or bareboat charterer of BASILIA agrees to subject

this claim to English law and jurisdiction pending the completion of the ASG2 jurisdiction agreement. A

[16] Central to the dispute here was that the plaintiff took the view that no security had been given by the defendant and hence necessitating the arrest. The affidavit affirmed by Hugh William Scheffer in February 2018 in support of the issuance of the warrant of arrest against 'Basilia' had averred that: B

> The Plaintiffs wish to inform the Court that security for their claim had been sought on their behalf on 26 January 2018 from the Defendants and/or their liability insurers (who are The London P&I Club) but to date the said security has yet to be provided or agreed to be provided to them in the quantum required or at all. The two responses so far received from the London P&I Club are: C
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> (a) On 26th January 2018 — 'We will discuss with our Members as to your security, request and will revert in due course'.
>
> (b) On 5th February 2018 — 'We are seeking instructions from our Members regarding your security request'. D

[17] That had formed the very premise for the application to court for the order to arrest the defendant's vessel. The arrest did not appear to be a case where the security under the LOU was viewed to be inadequate. Otherwise, the application for arrest should have alluded to the existence and terms of the LOU and only then stating that it was inadequate or fell short of the dictates and expectations of the plaintiff. E

[18] This then opportunely brings us to the other facet of an application for arrest of a vessel, which is the requirement for material disclosure of facts necessitating an arrest to be made. From the tone of submissions from both parties, I find that there was a concession that there was a general duty or obligation for disclosure. F G

[19] Paragraph 13 of the plaintiff's submission had stated that:

> Hugh did not mention on the 1st LOU in his affidavit in support. The reason for this is because no agreement had been reached between the Plaintiff and Defendant to accept the form of security being tendered by the Defendant, the Defendant's Deponent had not properly transcribed the content of one of Alan Speed's emails to her in an important respect, and with the Defendant's vessel 'Basilia' about to be scrapped, it became necessary to arrest the vessel 'Basilia' in Malaysia. H

[20] That would mean that at the time that arrest was sought, the plaintiff had known about the LOU but chose to leave it out. I

[21] Quite apart from whether on the face of the LOU, the plaintiff can claim the same to be inadequate and not in compliance of the terms imposed

by the plaintiff, I am fortified in my view that there must first be disclosure of the LOU before there can be any basis or foundation to mount a challenge as to its adequacy.

[22] For a better perspective as to the controversy on the adequacy of the LOU, it would be helpful to look at the contents of the second letter for comparison, which terms are set out as follows:

> IN CONSIDERATION of your releasing and/or refraining from arresting or otherwise detaining the 'BASILIA' or any other vessel or property in the same or associated ownership, management, possession or control for the purpose of obtaining security in respect of your claim arising out of the above collision at our request ('the said Vessel') in your above in rem action in the High Court of Malaya at Johor Bahru against her and/or her owners
>
> We, THE LONDON STEAM SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED of 50 Lemen Street, London E1 8HQ hereby irrevocably and unconditionally undertake to pay to you or to your order or demand such sum or sums which may be adjudged to be due to you from the said Vessel and/or from her owners in respect of your claim in your said in rem action. Provided always that our total liability hereunder inclusive of interest and costs shall not exceed the sum of USD 450,000 (US Dollars Four Hundred And Fifty Thousand Only).
>
> We further consent and agree that the undertaking given herein shall equally apply to any compromise or settlement between yourselves and the owner of the said Vessel in respect of your said claim or to any amount by way of damages, interest and costs agreed by the said owners to be payable to you so that if they do not pay such amount(s), we shall be liable for the same in the same manner as if they had been adjudged by the courts in Malaysia.
>
> We further agree that this undertaking shall be a continuing undertaking until the final disposal of your said claim and all sums adjudged or agreed to be payable or due to you and received by you in full and the granting of any time or other indulgence to the said Vessel and/or her owners by you, your servants or agents shall not in any way avoid or prejudice your rights herein.
>
> We hereby warrant that we have received irrevocable authority from the owners of 'BASILIA' to warrant on their behalf that at the time of the collision giving rise to your claim in your said action she was not on demise charter to any party. We hereby warrant that we have received irrevocable authority from the owners of 'BASILIA' to unconditionally submit to the jurisdiction of the Courts of Malaysia for the purpose of this in rem proceedings and will appoint (within 5 working days of the Johor Bahru High Court ie Sundays to Thursdays except on public holidays) a firm of solicitors practising in West Malaysia to conduct the in rem proceedings on behalf of the owners of 'BASILIA'.
>
> This undertaking shall be governed by and construed in accordance with Malaysian Law and we unconditionally submit to the jurisdiction of the Courts of Malaysia for the purpose of any court proceedings taken by you to enforce the same or an provision herein.

[23] The plaintiff had referred to the case of *The Evmar* [1989] 2 MLJ 460; [1989] 1 LNS 39 to support the argument that the fact of pending negotiations need not be disclosed. The relevant portion of the case is as follows:

> As regards the third ground, it is true that at the time the application for the warrant of arrest was made, the solicitors of the parties were negotiating for alternative security in lieu of an arrest. As described above the hitch related to the wording of the letter of undertaking. As the parties were unable to agree, the plaintiffs proceeded with the application for the warrant and the vessel was duly arrested. The question is: must the fact of pending negotiations be disclosed in the affidavit sworn to lead the warrant of arrest? It is quite clear that when the plaintiffs' counsel appeared before the assistant registrar to apply for the warrant of arrest, no concluded agreement had yet been reached regarding alternative security, whatever might be the cause. The matters that must be stated in such an affidavit are prescribed in O 70 r 4 of the RSC. Nothing in that rule requires that matters relating to pending negotiations for security should be stated in the affidavit. Obviously, if the negotiations had succeeded, there would have been no need to apply for a warrant. It was precisely because the parties were unable to reach an agreement for alternative security that the arrest was proceeded with. I do not think it matters what was the point of difference between the parties that held up an agreement or whether who was right or who was wrong. The plaintiffs were entitled to security and unless an agreement was reached as to alternative security, the plaintiffs were at liberty to proceed. The fact of negotiation is, in my view, quite immaterial.
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> No authority has been cited in support of the proposition that the fact of pending negotiations must be disclosed in the affidavit and that such a failure would amount to a material non-disclosure. As no merits have been shown on any of the three grounds, there is, therefore, no basis to set aside the warrant of arrest.

[24] A distinguishing factor here with *The Evmar* case was that there was the LOU in the equation, where some account must be taken as to its purport and adequacy.

[25] Under the circumstances of this case, I find that there was material non-disclosure and a breach of the duty to act in good faith. Without the disclosure of the LOU, the issue of whether the undertakings given therein were sufficient or otherwise could not have arisen.

[26] The second letter had seemingly been achieved without invoking the court's process, in that there was no argument before the court as to whether the LOU was valid, binding or adequate before the second letter was issued.

[27] Having gone the extra step and having compared the contents of the LOU with the second letter, I do find the difference to be relatively insignificant. The figure separating the two was only USD50,000, which would not be payable as of right but would ultimately still be a compensatory limit, depending on proof of actual damage to the plaintiff's vessel. The figure

of USD400,000 stated in the LOU had not been an arbitrary or unilateral figure, but had been given in relation to an exchange of emails.

[28] The other complaint on lack of confirmation whether the defendant's vessel was on bareboat or demise charter must be taken in the context that an undertaking had ultimately been given.

[29] The fact that the inadequacy of the LOU was canvassed only after arrest and in the course of setting aside the arrest would dilute the strength of the argument, as the object of the exercise post-arrest would surely have been to justify the arrest.

[30] This brings us to the law on setting aside of arrest, which had been addressed in the case of *The Evmar*. The prevailing thread running through all the decisions on setting aside is that there must be mala fides or 'crassa negligentia' shown.

[31] In the case of *Centro Latino Americano de Commercio Exterior SA v Owners of Kommunar, The Kommunar (No 3)* [1997] 1 Lloyd's Rep 22, the relevant portion of the decision had stated as follows:

> Two types of cases are thus envisaged. Firstly, there are cases of mala fides, which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly, there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel. It is, as I understand the judgment, in the latter sense that such phrases 'crassa negligentia' and 'gross negligence' are used and are described as implying malice or being equivalent to it.

[32] The arrest of the vessel in Malaysia would go hand in hand with the intention to have the collision claim adjudicated by the Malaysian court.

[33] On the issue of jurisdiction, in the exchange of emails between the parties, there was never any mention of having the collision claim being adjudicated by the High Court in Malaysia. In fact, the plaintiff had inquired in an email dated 5 February 2018 whether the defendant would agree to English jurisdiction using the ASG2 format. It was not as if the defendant had imposed a jurisdiction unilaterally in the LOU, which was arbitrary, objectionable and wholly outside the contemplation of the plaintiff.

[34] There was also evidence of proceedings before some tribunal in Russia with regard to the collision, which would likely be initiated by the plaintiff being the party aggrieved by the collision. Again, consistent with its earlier approach, the plaintiff seemed content to be economical with the facts.

[35] In *Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or any other Person Interested in the Ship or Vessel the 'Borcos Takdir'* [2011] 6 MLJ 562, it was decided that the court will step in to prevent abuse where one party may be unreasonable in its demands for security. It was alluded as follows:

> [26] In situations where the arrest of a vessel was wrongful or where there was for some reason an abuse, it follows that a court may well discharge a private form of security upon release of the vessel. The entire basis for the provision of the private security was tainted or flawed and therefore discharge or cancellation of such an ineffective instrument is necessary. The jurisdiction of the courts to act in such situations is therefore clear. However it is an entirely different matter for the court to intervene in a consensually agreed private arrangement, at the behest of one party and to rewrite the agreement between the parties. I can only echo the words of Barrett J in *The Alacrity* (above), namely that:
>
> > ... It is no function of the court and, as I understand it, it has never been, to write a contract for parties before the court ... An in rem action confers a valuable albeit draconian, right upon a plaintiff. I see no warrant for obliging that plaintiff to take an alternative form of security that he does not find acceptable and for which the party giving the security is not, as in the case of bail, immediately answerable to the court. I decline jurisdiction in the circumstances.
>
> [27] In like vein the plaintiffs here having agreed to the quantum of security in 2004, with the requisite knowledge and ability to assess the quantum of damages likely to arise, cannot now seek to have that sum varied upwards without the consent or agreement of the defendant and the third party providing such indemnity.
>
> [28] I am borne out in reaching the aforesaid conclusion by the case of *Sadit Timber Sdn Bhd v The 'Ling Yung' and 'Thai Yung', Owners &Ors* [1984] 2 MLJ 217 where Chong Yik Liong J had occasion to consider whether the High Court had jurisdiction to substitute a new undertaking for the original undertaking at the request of the defendants in that case. In support of that contention, the defendants in that case relied, as is the case here on *The Moschanthy* (above). The learned judge dismissed the contention stating:
>
> > ... With respect I do not see how this passage can support the submission that the court has jurisdiction to substitute the new undertaking for the original undertaking. What Brandon J said in that passage, according to my understanding, amounts to this, that is, even if the amount of security in actions in rem has been agreed upon by the parties, the court still has power to vary the amount where the amount is shown to be excessive, and it is certainly far from saying that the court has jurisdiction to vary the agreed method of giving security or to substitute a different kind of undertaking for the undertaking previously agreed by the parties.
> >
> > In *The Alletta*, it was held that the court has no jurisdiction to make an order releasing a security not given to the court and not taking the form of a bail bond under the provisions of RSC O 75, r 16.
> >
> > I am inclined to follow *The Alletta* in my approach to this question. I am of the

A view that where security in an action in rem is furnished by private agreement, such security can only be varied or substituted by mutual agreement of the parties or with the consent of the party affected by such variation or substitution. In the present case, the security by way of the original undertaking was given to the plaintiffs and not to the court in the form of a bail bond as provided under
B our Rules of the High Court O 70 r 15 (which is in pari material with the English RSC O 75, r 16) and I fail to see how I have any jurisdiction to make the order sought in this application.

[29] I respectfully agree and adopt the reasoning above. As stated by the learned judge and indeed by Brandon J in *The Moschanthy* and *'The Polo II'* (above) (which
C passage I have reproduced above) the power of the court to control and thereby vary or modify security arises from its inherent jurisdiction to prevent any abuse of the process of the court or the use of court procedure in an oppressive way. As such it is only to stop such abuse or oppressive conduct which may arise, for example where a plaintiff, when exercising the power to arrest seeks to utilise that power
D oppressively by demanding for extortionate sums of money that the court will step in its inherent admiralty jurisdiction to stop such abuse (as was the case in *'Inai Selasih'* (above). The court will act to stop such abusive or oppressive conduct.

[36] Looking at the second letter, I am minded to agree that the defendant
E had little choice to accede to the issuance of the second letter as a means to expedite the release of the vessel. The contents of the second letter would be somewhat indicative that except for the jurisdictional issue, its difference or variation from the LOU was not to such a degree as to warrant immediate recourse to the court.

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[37] In the event of the arrest of a vessel being wrongful, as a consequence, the defendant would be entitled to damages.

[38] In the case of *Ocean Gain Shipping Pte Ltd v Owner and/or Charterer of*
G *Demise of Vessel Dong Nai Registered At Haiphong Port, Vietnam (The Dong Nai)* [1996] 4 MLJ 454, a similar situation had also arisen where the court had held that damages would be incurred as a result of a wrongful arrest. It was, inter alia, held as follows:

H (6) An application to set aside the warrant of arrest meant that the defendants were alleging wrongful arrest and wrongful continuance of the arrest their ship. Therefore, the appropriate test to be applied was whether there was mala fides or *crassa negligentia* implying malice on the part of the plaintiffs. On the evidence tendered, the court found that malice had been established against the plaintiffs. Hence, the arrest of the Dong Nai was in fact wrongful (see p 466A–D; *The*
I *Evangelismos* (1858) 12 Moo PC 352 and *The Euroexpress* [1988] 3 MLJ 367 followed).

(7) As malice had been proved, the defendants were entitled to damages in respect of their reasonable and foreseeable costs and expenses of obtaining the ship's release from the wrongful arrest. Further, the defendants would be entitled to recover the

overheads, expenses thrown away by reason of the arrest of the Dong Nai, salaries of the crew, insurance and loss of profit in the use of the Dong Nai while it was under continued arrest. The costs incurred by the defendants would be borne by the plaintiffs (see p 466D–G; *The Victor* (1866) 167 ER 38, *The Glasgow* (1855) 166 ER 1065, *The Nautilus* (1856) SW 105 and *Aiden Shipping Co Ltd v Interbulk; The Vimeria* [1986] 1 AC 965 followed).

[39] The LOU was challenged that it was not between the parties. Reference was however made by the defendant to the provisions of ss 179 and 190 of the Contracts Act 1950. In particular, s 179 provided as follows:

Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

[40] Although it may be challenged that the LOU was not between the parties, I am satisfied that the provisions of ss 179 and 190 of the Contracts Act 1950 are applicable.

[41] The question then arises whether the defendant would be entitled to stay the proceedings in Malaysia by reverting and asserting the jurisdiction agreed under the LOU.

[42] The binding nature of such an agreement would take along the lines of the decision in the case of *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322, where it was held as follows:

In the latter, the plaintiff brings an action here in breach of an agreement to resolve the dispute in a foreign tribunal. The court is, of course, not bound to give effect to such an agreement. A forum selection agreement is to be treated upon the same footing as an agreement that confers jurisdiction. Since consent cannot create or confer jurisdiction upon a court that has none, it also cannot oust the jurisdiction that is properly seised of litigation. I draw support for this view from the judgment of Lord Denning in *The Fehmarn* [1958] 1 All ER 333; [1958] 1 WLR 159. Although that judgment has been criticised by academicians (see the articles in (1958) 7 ICLQ 599 and (1977) 26 ICLQ 825 at p 851) and by counsel for the appellant before us, I respectfully agree with the views expressed by Lord Denning and gratefully adopt them as my own.

Having said all that, once the defendant invokes the agreement, the burden is on the plaintiff to show why the agreement should not be honoured. But there the difference ends. For, the matters that are relevant to the exercise of discretion in both cases are almost identical. This is well illustrated by *The Frank Pais* [1986] 1 Lloyd's Rep 529.

That was a case where an application was made to stay an action on two grounds. The first was based on a clause in the bill of lading which, inter alia, required all

disputes to be decided in the country where the carrier (the defendant in that case) had his principal place of business. The defendant in that case had his principal place of business in Havana, Cuba. The second ground was that England was forum non conveniens. Sheen J rejected the argument mounted on the contractual provision and in doing so he applied the statement of the law in *The El Amria* [1981] 2 Lloyd's Rep 119. This is what he said:

> The defendants move the court for a stay on the alternative ground of 'forum non conveniens'. The matters which have to be considered by the court when exercising its discretion whether to give effect to an agreement to refer disputes to a foreign court include those matters which are relevant to an application to stay on this alternative ground of forum non conveniens. As the plaintiffs have discharged the burden of showing strong grounds why I should not grant a stay of this action despite the agreement that any dispute should be decided in Cuba, it follows that the defendants would be unable to discharge the burden upon them of showing that, in the absence of such an agreement, this action ought to be stayed.

In the present state of the law, I am unable to say that the approach adopted by Sheen J is wrong.

[43] The second letter was achieved under the then prevailing situation of the defendant's vessel having been arrested and with a view of expediting its release.

[44] The defendant had relied on the provisions of ss 14, 15 and 19 of the Contracts Act 1950 to avoid the second letter. The case of *Pao On and others appellants v Lau Yiu Long and others respondents* [1980] AC 614 was referred to that 'Duress, whatever form it takes, is a coercion of the will so as to vitiate consent'.

[45] Looking at the circumstances, I am inclined to believe that it could not have been voluntary or embarked upon on level terms. I would even venture to accept that such expedience could even have amounted to mitigation of sorts by the defendant.

[46] On the whole, I find that the LOU had met all the conditions imposed by the plaintiff with no other requirements that would have necessitated an arrest of the defendant's vessel. The backdrop for the arrest would have fitted into the scenario painted by the case of *The Evmar*, where it was stated as follows:

> The test to be applied to determine whether there was wrongful continuance of an arrest is the same as that applicable to wrongful arrest, ie mala fides or *crassa negligentia* implying malice: see *The Magaret Jane*. In my judgment, the plaintiff's refusal on 14th March 1998 to accept the letter of undertaking amounted to at least malicious negligence. The arrest was clearly continued unnecessarily. The plaintiffs

are therefore liable to damages for the continued detention of the vessel from 14 to 15 March 1998.

[47] Be that it may that the plaintiff may have taken the position that negotiations had not been concluded, all the same, arising from the arrest, there should have been some correspondences which could be said to be a contemporaneous record that an agreement had not been achieved under the LOU.

[48] Under those circumstances and taken with the non-disclosure of the LOU, I would be more inclined to find that the LOU was already ad idem between the parties, and that the second letter was on a balance of probabilities, procured by duress. In the premises, I would allow the second letter to be set aside.

[49] As the LOU had constituted a concluded contract which would be binding between the parties, I am satisfied that the defendant has succeeded in its challenge on a balance of probabilities that the arrest of its vessel was wrongful. As a consequence, the defendant would be entitled to damages.

[50] I would therefore allow orders for a stay of proceedings herein, to set aside the warrant of arrest, declare the LOU to be binding on parties, the second letter to be void, the arrest of the vessel 'Basilia' to be wrongful and for damages to be assessed.

[51] The application is allowed in terms of Items 1 (subject to compliance of the ASG-2 Form to be issued within 14 days to the plaintiff), 2, 3, 4, 5, 6 of encl 15 with costs, except that costs to be taken up and assessed upon completion of assessment for damages.

Defendant's application allowed.

Reported by Mohd Kamarul Anwar